IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 34/1999

Shri Vivekanand Raghunath Naik
Gaonkar, major, r/o. H.No. 494/2,
Agonda, Canacona, Goa. ..... Appellants.

V/s

Shri Vinayak Nilba Naik Gaonkar
(since deceased) represented by:

1)Shri Narendra Vinayak Naik
Gaonkar (son);

2)Smt. Navneeta Narendra Naik
Gaonkar (daughter)
3)Shri Molu alias Mallikesh
Vinayak N. Gaonkar (son);

4)Miss Archana Vinayak Naik
Gaonkar (daughter)
all residents of Dessai Waddo,
Agonda, Canacona, Goa.

5)Smt. Lata V. Naik Gaonkar
(daughter), married with
Shri Anant Prabhu Dessai, resident
of Kalsona, Quepem, Goa.

6)Shri Anant P. Dessai,
Resident of Kakoda-Goa
(son-in-law),

7)Smt. Jyoti Vinayak N. Gaonkar
(daughter) married, resident of
Mokhard Shristal, Canacona, Goa.

8)Anjali V.N. Gaonkar,
married with Shri Sharad Datta Phaldessai,

Resident of Dessaivado, Agonda,
Canacona, Goa.

9)Smt. Smeta V. N. Gaonkar
(daughter) married, with Sameer S. Naik,
Resident of Char Rasta,
Nagarcem, Canacona, Goa.

10) Shri Sudhakar Purshottam Naik
Dessai, son-in-law, resident of Mudkud,
Agonda, Canacona, Goa.

11)Shri Sameer S. Naik,
Resident of Char Rasta,
Nagarcem, Canacona, Goa. ..... Respondents.

Mr. M. S. Sonak, Advocate for the appellant.

Mr. C. A. Coutinho, Advocate for the respondents.

CORAM : F. I. REBELLO, J.

DATE : NOVEMBER 19, 2007.

ORAL JUDGMENT:

This appeal was admitted on the following question of law:

"Whether the lower appellate Court could have decided an issue which was not disputed by the respondent viz. the identification of the property in view of Order 8, Rule 5 of Civil Procedure Code?"

Order 8, Rule 5, sub-rule (1) read as under:

> "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability;
>
> Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission"

2. A few facts may now be set out. The appellant before this Court was the original plaintiff and the respondent original defendant. In the plaint, the plaintiff had averred as under:

> "The plaintiff is the co-owner of the property known as KERI, situated at Agonda, Village Panchayat Agonda, Taluka Canacona, enrolled for matriz under no.351 and 353, both these properties are together surveyed under no. 64/4 of the Village Agonda and they are presently bounded on the east by road, on the west by the property of Devappa N. Dessai, on the North by road and property of Babu V.N. Gaonkar and Vithoba B. N. Gaonkar, and on the South by the property of Anant N. Gaonkar, and others and Ganesh Narab Naik Desai (hereinafter called the SUIT PROPERTY)."

The defendant No.1, in his written statement under reply to the pleadings in para (1) of the plaint, set out as under :

> "With reference to para 1 of the plaint, it is denied that the Plaintiff is the co-owner of the property known as "Keri" situated at Agonda and enrolled in Matriz under No.351 and 353, which are surveyed under No. 64/4 of Village Agonda. The Defendant submits that the Plaintiff has no right to the said property at all. The defendant submits that he is one of the co-owners along with the owners of the suit property and the Plaintiff has no right to the same. The name of the Defendant's brother by name Shivram Nilba Naik Gaonkar is included in the survey record as co-occupant. ..."

3, Based on the pleadings, the trial Court framed several issues. The only issue which is relevant for our consideration is issue no.1, which reads as under:

> "Whether the plaintiff proves that he is co-owner of the suit property described in para 1 of the plaint ?"

The learned trial Court, in so far as issue no.1 is concerned, was pleased to answer the issue in the affirmative, in favour of the appellant. The trial Court also found that the defendant had interfered with the rights of the plaintiff over the property and, accordingly, decreed the suit. In the cross examination, the following suggestion was put to the plaintiff: "I say that property bearing matriz No. 351 and 353 are not adjoining each other. In

between these two properties, there are two more plots of different owners. It is not true to suggest in the plaint I have stated that survey No.64/4 corresponds to matriz no.351 and 353 only". It has also come in evidence that apart from the property of the plaintiff surveyed under Survey No.64/4, others names are also shown in survey No.64/4.

4. The respondent aggrieved by the order of the trial Court, preferred an appeal before the District Court, Margao. The learned District Judge fixed points for determination. One of the points was "whether the plaintiff had proved that the said property is surveyed under Survey No.64/4 ?"

On consideration of the evidence on record, the learned first appellate Court held that the father of the defendant had no right to the property "Keri" bearing matriz nos. 351 and 353 and further that the defendant had also not proved that his wife had inherited the said property through one Poclo Ganba Naik and that the property at matriz nos. 351 and 353 originally belonged to Poclo and others and that the heirs of Poclo had transferred their rights in favour of Dattu Naik Gaonkar who was the grandfather of the plaintiff. After having so recorded the finding, the learned Judge proceeded to hold that in respect of survey No.64/4 not only the name of Raghunath was shown, but also of one Shivram Naik Gaonkar and some others. Based on this finding, the learned trial Judge proceeded to hold that

the plaintiff/appellant herein though had established his right to the property bearing matriz nos. 351 and 353, had failed to locate the property and had also failed to prove that the defendant/respondent interfered in the suit property or any portion thereof and accordingly, allowed the appeal. This judgment is subject-matter of the present second appeal.

5. At the hearing of this appeal, on behalf of the appellant, the learned Counsel submits that the respondent/defendant, at no point of time, had disputed the fact that matriz nos. 351 and 353 are part of survey No.64/4 and on the contrary, had admitted the same. Bearing in mind the provisions of Order 8, Rule 5, the trial Court had correctly framed the issue and had answered it in favour of the appellant herein. The first appellate Court, even though no issue had been framed as to whether matriz nos. 351 and 353 form a part of survey no.64/4, fixed a point for determination. It is submitted that this clearly amounts to an error of law as there was a clear averment by the appellant in the plaint that matriz nos. 351 and 353 formed part of survey No.64/4. The respondent, in his written statement, had not disputed the same and as such, the same amounts to an admission.

On the other hand, on behalf of the respondent, the learned Counsel submits that admittedly in survey documents, apart from the name of the appellant, the names of brother of the respondent and some other persons

are also shown. In these circumstances, it is submitted that the learned first appellate Court was right in refusing to grant the relief as the appellant herein had not identified the property and consequently, the appeal as filed, ought to be dismissed.

6. The question that arises for consideration is whether it was open to the first appellate Court to have fixed a point for determination in respect of which no issue had been framed. The issue framed was whether the appellant was co-owner of the property described in para (1) of the plaint. This, by itself, will show that there were other owners. It is settled law that a trial Court would only frame issues necessary for determining the controversy in the dispute. There is concurrent finding of fact, both by the trial Court as well as the first appellate Court that the appellant has established his right to the property identified under matriz nos. 351 and 353. The question is whether there was an admission by the respondent that matriz nos. 351 and 353 form a part of survey No.64/4. The pleadings in the plaint set out that the properties having distinct matriz number are together surveyed under survey No.64/4. In the cross examination of the appellant by the defendant, the appellant clearly had set out that it was not his case that survey No.64/4 consists only of matriz nos. 351 and 353. The defendant/respondent, in his written statement had specifically denied that the appellants are owners of the properties under

matriz nos. 351 and 353, which are surveyed under Survey No.64/4 of Village Agonda. The further case of the respondent was that he was one of the co-owners. In other words, the entire case of the respondent was that he was co-owner of the property enrolled surveyed under No.64/4. There was, therefore, no dispute as to the identity of the property in respect of which the respondents claim ownership. The respondent further did not dispute that the property was surveyed under survey No.64/4 of Village Agonda. In other words, the respondent admitted that both these matriz numbers form part of survey No.64/4. Once that is the case, considering the provision of Order 8, Rule 5, as there was no specific denial by the defendant to the averments in the plaint by the appellant, ought to have been admitted. Apart from that, even in the cross examination, there is nothing put to the appellant that it was not possible to identify the matriz numbers under Survey No.64/4. Clearly, therefore, there was a clear admission by the respondent. The learned trial Judge, in the absence of any dispute, also did not frame an issue. It was neither the case of the appellant nor the respondent that there was any controversy about the identity of the property.

7. In these circumstances, the first appellate Court totally misdirected itself in law in fixing as a point for determination as to whether the appellant had proved that the property is surveyed under survey No.64/4.

In my opinion, apart from the admission, there were suggestions put and evidence led by the appellant that matriz nos. 351 and 353 are located in survey No.64/4. The finding, therefore, by the learned first appellate Court that the appellant had not identified his property is clearly perverse and is liable to be set aside.

8. The first appellate Court has also proceeded on the footing that the appellant has not been able to show that the respondent interfered with the property. The respondent's case throughout was that he has right to matriz nos. 351 and 353 and that he was in possession. To the averments by the appellant in paras 13 and 14, was a mere denial with an avertment that Narcinv Yeshwant Naik had no right to collect caju apples. The trial Court, in para (10) of the Judgment had specifically stated that there was no denial by the defendant to the allegation that on 1.4.89 they came to the suit property with his sons. In the face of the appellant proving his title and identifying the property and the respondent claiming right in the property and seeking to assert his rights, the finding by the first appellate Court that there was no interference will have to be set aside.

9. In the light of the above, the order passed in First Appeal dated 5.1.1999 is set aside and the order of the trial Court is restored. The appeal is

allowed accordingly. In the circumstances of the case, there shall be no order as to costs.

F. I. REBELLO, J.

ssm.